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No. 99-936

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IN THE

Supreme Court of the United States

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

v.

THE CITY OF CHARLESTON, SOUTH CAROLINA, *et al*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Motion for Leave to File as *Amici Curiae* and Brief in Support of the Petition for Certiorari of the American Public Health Association, American Society of Addiction Medicine, Society of General Internal Medicine, South Carolina Medical Association, National Association of Alcoholism and Drug Abuse Counselors, Inc., National Council on Alcoholism and Drug Dependence, American Nurses Association, South Carolina Nurses Association, Association of Reproductive Health Professionals, American Medical Women's Association, National Women's Health Network, National Association of Social Workers, Inc., Association for Medical Education and Research in Substance Abuse, Society for Medical Anthropology, California Medical Association, California Society of Addiction Medicine, Institute for Health and Recovery, Consortium for Substance Abusing Women and their Children and Robert G. Newman, M.D.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Sup. Ct. Rule 37.2(b), *Amici* -- physicians, nurses, counselors and public health practitioners from around the country and their professional associations -- move for leave to file the attached brief *Amici Curiae* in support of the Petition for Certiorari filed by Crystal Ferguson, *et al.*, seeking review of Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999).

In the decision below, a divided panel of the Fourth Circuit upheld a governmental policy whereby the trust inherent in the doctor-patient relationship was manipulated by law enforcement authorities to obtain bodily fluids from indigent pregnant women for use as incriminating evidence.

Amici have recognized expertise in the areas of the physician-patient relationship, the need to maintain the confidentiality of personal medical information, maternal and neonatal health, and the treatment and prevention of substance abuse among pregnant and parenting women. This brief is offered to highlight basic medical misunderstandings that infected the decision upholding the policy's constitutionality and to alert this Court to the real harms that the Fourth Circuit's decision, if left undisturbed, will cause individuals, their families and their communities.

Amici, from their vantage point as health care and social services providers and medical researchers, wish to bring to the Court's attention the troubling consequences of the Ferguson decision not only for the patients receiving treatment at the Medical University of South Carolina but for all patients.

This motion is necessary because Respondents have declined to consent to the filing of the following proposed brief.

INTEREST OF *AMICI CURIAE*

As the names of the *Amici* organizations suggest, and the descriptions of these organizations appended to the attached proposed brief underscore, *Amici* comprise a broad array of South Carolina and national medical, social services, legal services, and substance abuse treatment organizations, with memberships that range from direct service providers to researchers, academics, and theorists. What unites these organizations is a recognition that substance abuse is a treatable disease but that the Fourth Circuit's decision in Ferguson threatens to stymie the delivery of effective treatment to some of the most vulnerable patients in the community.

Amici share at least two basic, interrelated interests in this case. First, *Amici*, many of whom provide prenatal and substance abuse treatment to pregnant women, understand that the Ferguson decision strikes at the core of the physician-patient bond, undermining the trust and confidence essential to the critical relationship between health care professionals and their pregnant patients. To compromise the doctor-patient relationship is to compromise care. The result will be damaged health, increased suffering, escalating health care costs, and decreased life expectancy.

Second, *Amici* are concerned that the decision below will deter pregnant women from obtaining adequate prenatal care, including substance abuse treatment. *Amici*, individually and as a whole, have professional and ethical interests in promoting women's and children's health, and wish to apprize this Court of the tragic health implications of the Fourth Circuit's decision for pregnant women and their children.

Respectfully submitted,

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STATEMENT OF INTEREST*

As the Petition for Certiorari filed by Crystal M. Ferguson, *et al.* makes plain, the Court of Appeals decided this case in a manner that cannot be reconciled with this Court's teaching concerning the narrow scope of the "special needs" exception to ordinary Fourth Amendment requirements. *Amici* respectfully submit this Brief to highlight the full importance of the issue wrongly decided by the Fourth Circuit panel majority. See Sup. Ct. R. 10.

Amici include physicians, nurses, counselors, public health practitioners and their professional associations. They have both recognized expertise and longstanding concern in the areas of maternal and neonatal health and in the understanding and reduction of the harms that drugs and other substances can cause users, their families and society as a whole. This Brief is offered to cast light upon basic medical misunderstandings that marred both the prosecutorial policy at issue and Fourth Circuit's decision and to alert this Court to the real harms that the decision, if left undisturbed, will continue to cause.

SUMMARY OF ARGUMENT

Under any circumstance, the potential significance of the Court of Appeals legal ruling would be large. If, as that Court held, the interest of law enforcement officers in deterring conduct already prohibited by the criminal code could count as a "special need" for Fourth Amendment purposes (at least when pursued without "vindictiveness"), there would be few cases left for which the constitutional rule, that searches conducted without warrants and probable cause are unreasonable *per se*, and not the narrow special needs exception, would control.

But the specific governmental policy at issue here --

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*No entity or counsel apart from those whose names appear on this Brief have contributed monetarily or substantively to its production. Sup. Ct. R. 37.6.

drawing on the trust inherent in the doctor-patient relationship to obtain bodily fluids for use as incriminating evidence -- is especially offensive to the Fourth Amendment's core personal privacy concerns. Although the Court of Appeals decision characterized the invasion of privacy implicated here as "minimal," on the ground that "giving . . . a urine sample is a normal, routine, and expected part of a medical examination," see Ferguson v. City of Charleston, 186 F.3d 469, 479 (4th Cir. 1999), that conclusion ignores the reason why such intimate examinations have become "routine": individuals willingly undergo medically necessary, albeit personally intrusive procedures because protecting patient confidentiality is a fundamental part of the daily practices of the physicians, nurses, and counselors to whom they entrust their care. Indeed, the Medical University of South Carolina ("MUSC"), like all hospitals in which the members of *Amici* organizations practice, expressly informs patients that, absent their authorization, the sum and substance of their medical treatment will not be disclosed to third parties except to advance patient care.

The rules requiring respect for patient privacy ultimately rest on principle, but they reflect, as well, a critical public health reality. Decades of research and clinical experience teach that patients who do not believe that their privacy will be respected -- let alone those who fear that health professionals will perform tests in the service of police and prosecutors -- either will not candidly discuss their health conditions with those care providers or will avoid seeking help altogether. These problems are exacerbated where would-be patients have substance abuse problems; they become particularly pronounced when the would-be patients are pregnant women who suffer from chemical dependency. When such patients cannot trust their treatment providers to maintain the confidentiality of the therapeutic relationship, they tend to avoid prenatal care or refrain from full

disclosure to care-providers thereby increasing the health risk to their offspring.

Finally, although *Amici* have no interest in either minimizing the health dangers posed by *in utero* exposure to any drugs, licit or illicit, or in having this Court opine as-yet unresolved scientific questions relating to the relative risks posed by of different substances, it is important to note the lack of scientific support for the assumption that animated the policy and its defense (and perhaps the Fourth Circuit's finding of "special need," as well): that the dangers of maternal cocaine use are different in kind from other behaviors that raise risks to children. Without denying the clear advisability of protecting infants from exposure to cocaine, medical research is increasingly finding that the sense of impending "crack baby" crisis that impelled the prosecutors, doctors, and nurses here to discard ethical and legal responsibilities relating to patient privacy were without solid foundation.

Indeed, the facts of this case aptly illustrate the perils of allowing the "special needs" exception to operate as a license for relaxing the strictures of the Fourth Amendment in situations where the governmental purposes are perceived to be especially worthwhile or benevolent. Unlike in instances where compliance with the presumptive requirements of the Fourth Amendment is in tension with the practical exigencies of law enforcement, see, e.g., Chambers v. Maroney, 399 U.S. 42, 50 (1970), or situations where the full array of rules developed to curb arbitrary and overzealous law enforcement efforts seem less necessary, see, e.g, Camara v. Municipal Court, 387 U.S. 523, 537 (1967), the mere fact that government actors are particularly certain of the rightness of their ends cannot constitute a "special need" occasioning a more deferential constitutional standard. To the contrary, it is precisely in such situations that governmental officials are most likely to ignore privacy interests, to act arbitrarily, and to ignore objective facts. See generally Olmstead

v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding").

ARGUMENT

The significance of the Fourth Circuit's decision in this case has two aspects. First, the panel majority addressed an important question of Fourth Amendment law -- namely, when may courts discard the presumptively applicable regime for analyzing the legality of searches and seizures and rely on the more flexible "special needs" inquiry -- in a manner plainly out of step with the pertinent precedents of this Court. See Sup. Ct. R. 10(c). The divided panel's decision threatens serious consequences for search and seizure law generally. The more immediate effect of the court's decision, one no less broadly important, derives from the Court of Appeals' specific holding, that governmental policies such as the one challenged here -- where doctors and nurses are deputized to gather evidence for use by police and prosecutors -- are "reasonable" as a matter of constitutional law.

I. The Appellate Panel Majority Committed a Significant Fourth Amendment Error

As Petitioners have explained, the Fourth Circuit ruling did not question that the urine tests administered in this case were a "search" within the meaning of the Fourth Amendment, of the type that generally requires a valid warrant and probable cause. Rather, the court held that this case falls within one of the admittedly "narrow[]," 186 F.3d at 476, categories of situations in which those requirements have been held inapplicable, i.e, the class of cases where the challenged search or seizure is

occasioned by "special needs beyond those of ordinary law enforcement."

The panel's ruling rests on a serious misreading of this Court's decisions. Although the Court may not have articulated a "unified field theory" for determining when governmental action can be upheld in the absence of a warrant and/or probable cause, it has emphasized that such situations are rare, and the instances where it has done so bear scant resemblance to the policy challenged here. First, the Court has recognized that in certain situations the ordinary strictures of the Fourth Amendment would make law enforcement impracticable, see Chambers, 399 U.S. at 50, and that in others, the intrusion on legitimate privacy interests or the risk of arbitrary law enforcement is sufficiently minimal, see, e.g., New York v. Burger, 482 U.S. 691, 703-704 (1987) (administrative inspections of "closely regulated" businesses), or the governmental concerns sufficiently far removed from enforcement of the criminal law, that general rules developed to protect against prosecutorial or police excesses need not be rigidly adhered to, so long as the reasonableness of the particular action can be sustained. See, e.g., National Treas. Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (emphasizing that the drug-testing program upheld was "not designed to serve the ordinary needs of law enforcement" and that "results [could] not be used in a criminal prosecution of the employee").[1]

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[1]Many of the Court's decisions combine more than one of these considerations. Thus, in Skinner v. Railway Labor Execs. Ass'n, 489 U.S. 602 (1989), the "special needs" decision rested both on the fact employees were held to have diminished expectations of privacy as a result of having chosen to work in a "closely regulated" field, 489 U.S. at 627, and the fact that results would not be used against them in criminal proceedings. See also Vernonia Sch Dist. 47J v. Acton, 515 U.S. 646 (1995) (noting that public school students, by virtue of the government's "custodial and tutelary" (continued...)

Finally, the Court has generally not treated "special needs" balancing as yielding an answer to the ultimate Fourth Amendment "reasonableness," but rather as a means for "determin[ing] whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Skinner, 489 U. S. at 624 (upholding search "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion") (emphasis added).

The standard applied by the Court of Appeals eschews the limitations expressed and implied by these decisions. Rather, the panel majority purported to discern two very different lessons from this Court's cases: (1) that the involvement of law enforcement agents does not necessarily mean that a warrant and probable cause will be required, see 186 F.3d at 477 n.7 (citing Griffin v. Wisconsin, 483 U.S. 868, 870 (1987), and Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)); but cf. Chandler v. Miller, 520 U.S. 305, 314 (1997) (equating "special needs" with "concerns other than crime detection"), and (2) that prosecutors and police are not subject to the ordinary rules when they are acting without a "punitive" or "vindictive" purpose, 186 F.3d at 475 n.3. Thus, because the Court below believed it "abundantly clear that Appellees were motivated by a desire to protect the health of children born at MUSC," and not "a vindictive purpose to prosecute women who used cocaine during pregnancy," it ruled that a "special needs" mode of analysis was appropriate. See 186 F.3d at 479.

The two cases cited by the panel majority for the first

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[1](...continued)
power, could be subject to a "greater degree of supervision and control that could not be exercised over free adults," and that student athletes' urine samples "are not turned over to law enforcement authorities").

proposition are far removed from the circumstances that gave rise to this case. One of them, Griffin, dealt with probationers, individuals duly convicted of crimes under the constitutional standard of proof, who remain subject to ongoing criminal justice supervision and possible imprisonment and its attendant intrusions on privacy should they violate court-ordered terms. And policies of the sort upheld in Sitz are even further removed from this case. Sitz entailed a minor privacy invasion -- momentary detention at a roadblock -- which could be avoided altogether by driving a different route, 496 U.S. at 452, and a policy that left little, if any, room for arbitrariness in its application, see id. at 453 (noting that "uniformed police officers stop every approaching vehicle").

The policy here was different in every relevant respect. It involved an intrusive search of the person. The criteria for selecting individuals to be searched were unscientific and highly subjective, and the demographics of those chosen for searching bore a disturbing correlation to the apparent racial prejudices of the policy's chief administrator. And, unlike Sitz, where both the existence and purpose of the contested sobriety checkpoint were publicly known, poor women seeking obstetric care at MUSC neither were apprised of the fact that medical tests were being conducted in such a way as to establish "probable cause" against them, nor were they provided any practicable alternative to prenatal treatment at that medical facility.

Although the Fourth Circuit majority labored hard to minimize the distance between this policy and judicially-recognized exceptions, it spent little effort explaining how this case differs from the acknowledged "general rule," i.e., those cases where the absence of a warrant and probable cause make a search unconstitutional "*per se*," 186 F.3d at 476. If it were true that the presence of benign motives (such as the concern for child health proffered here) sufficed to exempt searches and seizures from the constitutional requirements of a warrant and

probable cause, then all efforts to confine the "special needs" analysis to a narrow, "carefully defined" class of situations would be doomed. Almost all criminal statutes exist to protect innocent third parties from harm, and, to the extent that subjective motives are relevant, it can be hoped that concern for those parties' well-being -- and not "vindictiveness" toward particular individuals prosecuted -- animates most efforts to enforce those laws.

Nor, as the Court of Appeals dissent showed, can the involvement of law enforcement or the centrality of a law enforcement goal be denied in this case. The policy originated with a suggestion from a hospital employee to the prosecutor that he "consider possible prosecution of the mothers of drug–affected babies," Pet. App. 69.[2] The Hospital pledged to do "anything [MUSC] needs to do to assist you" in "future criminal actions" "prosecuting mothers who gave birth to children who tested positive for drugs," id. at 67. Prosecutors and police drafted the guidelines for selecting women to be tested and for preserving the "chain of custody" of the urine samples. Indeed, the Fourth Circuit majority itself stated, in upholding the policy against plaintiffs' privacy claim under the Due Process Clause, that "[i]t is well settled that a state has a compelling interest in the identification of law breakers and in deterring future misconduct. Here, any medical records disclosed were disseminated only to a limited number of law enforcement personnel -- the prosecuting attorney and arresting officers -- in the course of their official duties." 186 F.3d at 482.

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[2]This case does not present the doubtless closer questions concerning potential Fourth Amendment limits on State-employed doctors' power to require patients to submit to unwelcome tests for medical reasons. Nor does this case challenge the constitutionality of the decision to construe South Carolina's criminal code in a manner that would support prosecuting pregnant women with substance abuse problems. See generally Whitner v. South Carolina, 492 S.E. 2d 777 (S.C. 1997), cert denied, 523 U.S. 1145 (1997).

Indeed, only one fact actually distinguishes this case from others where ordinary Fourth Amendment principles are accepted as controlling: that although these Petitioners were arrested and charged, based on the evidence police obtained, most were not prosecuted. But whether or not a trial occurs cannot determine the applicability *vel non* of the "special needs" test. Being arrested and jailed for a crime should not be easily brushed aside under any circumstances, let alone those giving rise to this case: Petitioners were subjected to police tactics that were degrading, physically detrimental to them and their children, and wholly unnecessary. Various of them were shackled to their hospital beds or arrested shortly before or immediately after giving birth, often while still dressed in hospital gowns and still suffering pain and bleeding from childbirth. Moreover, Respondents have at no point disavowed their intention to prosecute women based on the "evidence" gathered for that purpose by MUSC treatment staff at the behest of law enforcement. A policy whereby a prosecutor gathers incriminating evidence against a person, arrests and jails her, and charges her with a serious felony cannot be exempted from the purview of ordinary Fourth Amendment rules simply because the prosecutor "only" hoped (in his words) "to use legal intervention . . . to change human behavior" in the direction that he and MUSC believed desirable. 186 F.3d at 475 n.3.

The extremity of the general legal rule announced by the Fourth Circuit might be illustrated in two further ways. First, although the particular search in this case was a urine screen, there is nothing in the Court of Appeals decision that would prevent the application of the same "special needs" analysis (if not the same outcome) to other searches conducted with the same purpose, i.e., to uncover evidence that could be used to arrest and threaten prosecution of pregnant women believed to be ingesting allegedly fetotoxic substances. Indeed, a principled reading of the decision suggests that the test would apply. Thus, under the Fourth Circuit test, while a police-supervised search of the

belongings -- or homes -- of obstetrics patients meeting the stated "criteria" (e.g., only limited prenatal care or known past drug use, see 186 F.3d at 474) might be invalidated as unreasonable, the mere lack of probable cause or a warrant would pose no decisive Fourth Amendment obstacle.

Nor is the court's holding limited to cases where searches are conducted by officials other than the police. So long as the ultimate purpose is to protect others and not simply to punish the guilty targets of the search prosecutors and police would seem at liberty to conduct any (reasonable) searches and seizures without a warrant or probable cause, and without regard to whether those might practicably be obtained, -- even when they do so with the specific intent of developing probable cause to support an arrest.

II. The Fourth Circuit's Disregard for Important Medical Considerations Has an Ongoing, Adverse Effect on Public Health

Amici, public health professionals and treatment providers, are especially concerned about the negative impact that the Fourth Circuit's holding, were it to stand, will have on the quality of health care not only for pregnant women with substance abuse problems and their children, but for all patients. First, by affirming the constitutional reasonableness of the extreme policy at issue here, the Court of Appeals decision impedes the provision of appropriate health care in the affected States generally, by corroding the basic trust and confidence that are essential for every doctor- or counselor-patient relationship. Relatedly, the panel majority, in concluding that the challenged policy "effectively"addressed health "problems associated with maternal cocaine use" failed even to consider the policy's adverse effects on the readiness of pregnant women with substance abuse problems to seek out prenatal care or do so in a candid manner. As *Amici* can attest -- and a well-established

body of research confirms -- the policy's effect of deterring doctor visits carries serious health threats for the very persons whose well-being the policy purported to advance: pregnant women and the children whom they carry.

A. The Intrusion on Privacy Was Not Minimal

The panel majority's assertion that the invasion of privacy at issue here, urinalysis, can be discounted as minimal (on the ground that this procedure is a "routine" element of medical examination) fails to acknowledge that which enables physicians and counselors "routinely" to perform intimate tests and elicit potentially embarrassing and even incriminating personal information: the informed consent of the patient, obtained with both explicit and implicit reference to the duty of confidentiality health care professionals owe those whom they treat. See Jaffee v. Redmond, 518 U.S. 1, 12 (1997). This obligation to keep patient confidences can be found in the Hippocratic Oath. It is written into the canons of ethics of learned societies, see, e.g., American Med Ass'n Code of Ethics §9; American Psychological Ass'n R. 5.02, and into the tort and professional licensure laws of every State. It is further reflected in this Court's decisions construing the Federal Rules of Evidence, see, e.g., Jaffee, 518 U.S. at 10; Trammel v. United States, 445 U.S. 40, 51 (1980), and in numerous federal statutes, see, e.g., 42 U.S.C. § 290dd-2 (prohibiting federally assisted drug-abuse treatment programs from divulging patient identities and records); id. § 9501(1)(H) (codifying patients' "right to confidentiality" of mental health records).

Nor can the fact that a doctor or nurse is employed by the State alter this bedrock obligation. To the contrary, a patient no more assumes that her confidences to a government-employed doctor will be shared with the police than does a criminal defendant expect that her State-provided attorney will share privileged communication with the prosecutor who is paid out of

the same State funds. See Polk v. Dodson County Pub. Def. Office , 454 U.S. 312 (1981); cf. Jaffee, 518 U.S. at 10 ("like the . . . attorney-client privilege[], the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust").[3]

As medical and public health professionals and this Court have long recognized, the obligation of confidentiality is not solely a matter of principle. It is a necessary precondition of every relationship between a patient and a physician, nurse or substance abuse counselor. See Jaffee, 518 U.S. at 10 ("the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment"). Thus, not only does "[v]iolation of confidentiality . . . show[] disrespect to the patient as a human being," R. Arnold, *et al.*, Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research 345, 365 (M. Lipkin, Jr., *et al.*, eds., 1995); but it is widely recognized that:

> To make diagnoses and treat patients effectively, the physician must obtain sensitive information about a patient. A patient must be willing to tell a physician, who is often a total stranger, about such matters as drug usage . . . and to allow the physician to examine intimate parts of his or her

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[3]The Appeals Court's decision disregards, as well, the basic privacy difference between allowing a single doctor or nurse to perform an examination or conduct a test and having the same procedure observed or test results known by police, prosecutors, and a multitude of others – a privacy interest that transcends the desire of those at risk of prosecution not to be caught. Indeed, the difference is not merely intuitive. Last Term, in Wilson v. Layne, 526 U.S. 603 (1999), this Court affirmed that there is a distinction, cognizable under the Fourth Amendment, between the intrusion on privacy that occurs when a government official is present in a home pursuant to a valid warrant and that which happens when the same officer is accompanied by members of the press or public.

> anatomy. The promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people.. . .

Id.; accord A. Lazare, Shame, Humiliation, and Stigma in the Medical Interview, in id. at 333; see also D. Miller & M. Thalen, Knowledge & Belief About Confidentiality in Psychotherapy, 17 Prof. Psychol. Res. & Prac. 15, 18 (1986) ("patients view confidentiality as "an all-encompassing, superordinate mandate for the profession of psychology").

Although the particular Defendants in this case may have been able to trade on (and, misleadingly, foster) patients' well-founded assumption that their relationship was one of trust, that assumption obviously cannot survive when the judicially-approved, routine breach of confidentiality becomes common knowledge. Indeed, the possibility of a judicially-approved breach infects every such relationship.

B. Enlisting Care Providers in Law Enforcement Is Inimical to The Public Health

In pronouncing the challenged policy an "effective" way of "advanc[ing] the public interest" in tackling the "health problems associated with maternal cocaine use," 186 F.3d at 479, the decision below ignored a fundamental medical and legal distinction. Although the majority was not wrong to conclude that urinalysis is a reasonable way to identify women for whom some "intervention" is indicated, its decision evinces no consideration of whether a law enforcement-driven testing regime was necessary to "reduce health effects on children exposed to cocaine *in utero*," and, if so, whether the available ordinary law enforcement tools were somehow inadequate.

This was a serious legal error, for as this Court has explained, departures from the presumptively applicable Fourth

Amendment framework are appropriate only after it is explained "why ordinary law enforcement methods would not suffice." see Chandler, 520 U.S. at 320; see also Skinner 489 U. S. at 627 (1989) (noting that an otherwise impermissible search might be upheld when "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion").

This oversight was especially fateful in this case. As *Amici* can attest and a compelling body of medical research confirms, the effect of law enforcement intrusion on the delivery of prenatal care is so deleterious that not only is a strictly medical approach to maternal substance abuse more effective, but a law enforcement-driven approach threatens to make things worse, not better, for children exposed to cocaine *in utero*.

First, what has been said about patients generally concerning the need for trust applies with particular force to those with substance abuse problems:

> It is quite clear that part of treating [a chemically dependent person] as a patient includes embracing all of the appropriate ethical constraints of health care delivery . . . . Possibly at the top of the list of ethical issues that are of very special and fundamental importance to this group of patients is the appropriate maintenance of confidentiality.

M.J. Kreek & M. Reisinger, The Addict as a Patient, in Comprehensive Textbook 822, 830

And this is even more urgently the case where pregnant women with drug problems are concerned. These women are particularly reticent to see doctors and are especially reluctant to give accurate information concerning the nature and extent of their drug use -- lest such information be used to take their children away from them. Thus, after a comprehensive three-year study of perinatal substance abuse in southern States

(including South Carolina), the Southern Regional Project on Infant Mortality (an initiative of the Southern Governors' Association and the Southern Legislative Conference) concluded:

> If pregnant women . . . feel that they will be "turned in" by health care providers or substance abuse treatment centers, they will avoid getting care. If women are able to discuss their addiction with providers without fear of retribution . . . they are more likely to enter treatment.

Southern Regional Project, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women 21 (1993).

Numerous studies have confirmed that the intrusion of the criminal justice system on health care practices aggravates exponentially the already-strong reluctance to seek medical attention and treatment. Thus, the Board of Trustees of the American Medical Association determined that if the criminal justice system were used to deal with drug-abusing mothers, "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment,"[4] and the American Society of Addiction Medicine has similarly found that "criminal prosecution of chemically dependent women will have the overall result . . . increasing, rather than preventing, harm to children and to society as a whole."[5] And a United

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[4]American Medical Ass'n, Legal Intervention During Pregnancy, 264 JAMA 2663, 2667 (1990).

[5] American Soc'y of Addiction Med., Bd. of Directors, Public Policy Statement on Chemically Dependent Women and Pregnancy (Sept. 25, 1989).

States General Accounting Office study concluded that "the threat of prosecution poses . . . [a] barrier to treatment for pregnant women."[6]

The health consequences of this documented reluctance to seek care or confide fully in health care professionals are extremely serious for the pregnant woman and her future child. Open communication with physicians regarding drug use is necessary to insure optimum safety before, during and after deliveries. See D. J. Birnbach *et al.*, Cocaine Screening of Parturients Without Prenatal Care: An Evaluation of a Rapid Screening Assay, 84 Anesthesia Analg. 76 (1997) (patients using cocaine "may have untoward responses to anesthesia"); Unrecognized "Crack" Cocaine Abuse in Pregnancy, 77 British J. Anaesthesiology 553, 555 (1996).

By contrast, when substance abuse -- including cocaine use -- is known to treatment-givers, they can focus on providing interventions that substantially improve health outcomes for pregnant women and for children. A trusting relationship with health professionals makes it more likely that a pregnant patient will seek out and complete drug treatment, and far more likely that she will avail herself of early, comprehensive prenatal care. See S.R. Kandall, Substance and Shadow: Women and Addiction in the United States 278-79 (1996). Indeed, even if the pregnant patient does not reduce or discontinue her drug use, prenatal care has been shown to improve health outcomes. Pregnant women who use cocaine but who have at least four prenatal care visits have been found to face significantly reduced chances of delivering low birth weight babies,[7] and the negative health

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[6] GAO, ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women 5, 20 (1991).

[7] A. Racine *et al*, The Associationn Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City, 270 JAMA

(continued...)

effects associated with prenatal drug exposure can be mitigated through intensive counseling and training in parenting skills.[8]

The accumulation of clinical evidence as to the special barriers to – and special benefits of – full disclosure by pregnant women with substance abuse problems has led those who have studied this problem to conclude, with an unusual degree of unanimity, that punitive approaches must be avoided. In fact, *Amici* and every other prominent public health and medical organization to have given the subject serious consideration have rejected the notion of turning to the criminal justice system to address drug use during pregnancy. See American College of Obstetricians and Gynecologists Committee Opinion 55 (Oct. 1987) (resort to the legal system" is almost never justified" in treating pregnant women); American Academy of Pediatrics, Comm. on Substance Abuse, Drug-Exposed Infants, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant."); American Nurses Ass'n, Position Statement (Apr. 5, 1992) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants . . . . The threat of criminal prosecution is counterproductive"); see also Legal Intervention During Pregnancy, 264 JAMA at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate"); see generally State v. Luster, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health

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[7](...continued)
1581, 1585-86 (1993).

[8] See, e.g., L. P. Finnegan & S. R. Kandall, Maternal and Neonatal Effects of Alcohol and Drugs in Substance Abuse, A Comprehensive Textbook 513, 529 (J.H. Lowinson *et al.*, eds., 1997).

organizations opposing the prosecution of women for cocaine use during pregnancy).

The panel majority did not advert to this solid scientific and professional consensus that police- and prosecution-based approaches will yield more harm than good for the children exposed to drugs *in utero* -- nor did it appear to even consider it relevant to the Fourth Amendment inquiry.[9] Instead, the court cited this Court's admonition in Sitz that a policy does not fail the Fourth Amendment test merely because it is not the most effective one.

But the issue here is fundamentally different from that in Sitz. Unlike there, where claims of ineffectiveness were largely predicated on the low percentage (in absolute terms) of drunk drivers detected, this case relied on criteria for singling out particular individuals, see Sitz, 496 U.S. at 454 (distinguishing Delaware v. Prouse, 440 U.S. 648 (1979)), for a far more serious invasion of privacy.

Although the panel majority found it obvious that only urinalysis would enable Defendants to determine which patients to threaten with prosecution, the "effectiveness" assessment did not take account of the drastic consequences the policy might have as a deterrent not to drug use, but to doctors' visits. In cases such as Sitz and Von Raab, the deterrent effects of testing were mutually reinforcing: either individuals would not drink or they would not drive; here, the problem with linking testing disclosure and arrest and possible prosecution to medical visits is that it subverts the policy's professed objective -- encouraging

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[9]Thus, the court brushed aside as wholly irrelevant evidence that the policy was not, in many respects, designed to achieve its claimed objectives, insisting that the only relevant question is whether urinalysis is a reliable means of detecting the presence of cocaine.

pregnant women who use cocaine to seek medical assistance both for their drug problem and for their pregnancy.[10]

III. Cocaine Addiction Among Pregnant Women Does Not Present a "Special Need"

A recurring theme of decisions relieving governmental actors from presumptively applicable Fourth Amendment requirements is that the Constitution should not be construed as preventing the government from responding "reasonably" to exigent circumstances and crises -- a proposition evident in certain "special needs" cases, see, e.g., Skinner, 489 U.S. 602. In such cases, the limitation to needs "beyond those of ordinary law enforcement" has a different connotation: that a problem is so formidable that the Fourth Amendment restraints should not apply. The behavior of the Defendants in this case (and, to a lesser extent, the opinion of the Fourth Circuit majority) proceed on the assumption that cocaine use by pregnant women presented such a crisis, truly different in kind from those which law enforcement (and the medical profession) usually deal. Cf. 186 F.3d at 473.

Although that understanding is consistent with contemporaneous, sensationalized media accounts, *Amici* note that it is seriously lacking in support from empirical data. See,

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[10] *Amici* would hasten to add that not drinking or not driving may meaningfully be described as "options" for many of the individuals who test positive at sobriety checkpoints -- for example, social drinkers exercising poor judgment. As Defendants' policy plainly recognized, many women who continue to use cocaine after becoming pregnant cannot so readily "decide" to stop. At various times relevant to this case, drug treatment resources for pregnant women in Charleston were either entirely nonexistent or seriously inadequate. It might also be observed that the penalties imposed on those driving while intoxicated -- despite the potent threat to human life -- are orders of magnitude removed from the lengthy sentences confronting the plaintiffs in this case.

e.g., L. Mayes, *et al.*, The Problem of Prenatal Cocaine Exposure: A Rush to Judgment, 267 JAMA 406 (1992) (noting that "[f]indings about neurobehavioral effects in the newborn period have been inconsistent or contradictory"); D.R. Neuspiel, Cocaine and the Fetus: Mythology of Severe Risk, 15 Neurotoxicology and Teratology 305 (1993); See also H. Hurt *et al.*, Children with In Utero Cocaine Exposure Do Not Differ from Control Subjects on Intelligence Testing, 151 Arch. Pediatric & Adolescent Med. 1237 (1997).[11] Although *Amici* have no interest in downplaying the harm that ingesting cocaine could cause to a fetus or child -- indeed they share a professional dedication to avoiding and reducing those dangers -- it is important that this Court's disposition of this matter not be influenced by such widespread but discredited assumptions.

Rather, it has always been and remains a principal object of judicial enforcement of the Fourth Amendment to distinguish between those cases where otherwise unconstitutional law enforcement tactics are truly necessary and those where the claims of "crisis" -- even if sincerely subscribed to by "men of zeal," Olmstead, 277 U.S. at 485 (Brandeis, J., dissenting) -- turn out to be illusory. This policy at issue in this case falls squarely into the latter category, and, as explained above, the ongoing effects of the Fourth Circuit's approval continue to compromise the effective delivery of health care.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request this Honorable Court to grant the petition for certiorari.

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[11] See also J. Held, *et al.*, The Effect of Prenatal Cocaine Exposure on Neurobehavioral Outcomes: a Meta-Analysis, 21 Neurotoxicology & Teratology 619, 624 (1999) (noting "general consensus among researchers that the reproductive effects of cocaine appear to be minimal" and finding that "the effect of prenatal exposure to cocaine on neurobehavior appears to be only marginal and transitory").

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APPENDIX

Amicus Curiae American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, helping to set public health practice standards, and working closely with national and international health agencies.

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, and work in group practice or other clinical settings. A number are also involved in research and medical education. Through its clinical and scientific conferences, continuing medical education courses, and publications, including the quarterly Journal of Addictive Diseases, ASAM actively educates physicians, medical and osteopathic students, and the public about addiction disorders and diseases, as well as treatment guidelines and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance abuse treatment and counseling.

Amicus Curiae Society of General Internal Medicine ("SGIM") is the professional society of academic physicians who teach and conduct research in primary care Internal Medicine. The Society, which has nearly 3000 members in the United

States (including South Carolina) and 11 other countries, publishes the Journal of General Internal Medicine and is a leader in research and education in the medical care of adults. Many SGIM members have national expertise in issues related to alcoholism and abuse of other substances. SGIM is deeply concerned that the Ferguson decision, if let stand, could deter women in South Carolina and elsewhere from seeking drug-treatment and prenatal services that are essential to the delivery of a healthy child. The failure to maintain proper patient confidentiality (at the heart of MUSC's policy) will not only discourage women from seeking this vital care but may well interfere with physicians ability to provide it when sought.

Amicus Curiae South Carolina Medical Association ("SCMA") is the primary professional association for individuals licensed to practice medicine in South Carolina. The SCMA has over 5500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina. To this end, SCMA opposes policies and practices that undermine patient confidentiality and weaken the trust between health care providers and patients that promotes positive treatment outcomes.

Amicus Curiae National Association of Alcoholism and Drug Abuse Counselors, Inc. ("NAADAC") is the nation's largest organization of alcohol and drug counselors, with 17,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief becaus it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter pregnant women from seeking these essential services.

Amicus Curiae National Council on Alcoholism and Drug Dependence ("NCADD") with its nationwide network of affiliates, provides education, information, help and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD historically has provided confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. If NCADD affiliates were required to provide the names and medical information of drug-using pregnant women to law enforcement authorities, it would greatly inhibit their ability to serve this population. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs and Pregnancy" that recommended that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services. . . ." For these reasons, NCADD urges the Court to review the decision below.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing this nation's over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal-child health services is particularly critical to efforts to prevent disease and to provide early intervention for health care problems. Thus it opposes all barriers to prenatal care. ANA is concerned that when health care providers divulge patient information to law enforcement officials women in need of prenatal care and/or substance abuse treatment are deterred from seeking these essential services.

Amicus Curiae South Carolina Nurses Association ("SCNA"), a constituent member of ANA, is a professional organization which represents registered nurses in South Carolina. SCNA's legislative positions speak strongly to support

health care for a number of vulnerable populations and emphasize the importance of accessing prenatal health care secure in the knowledge that the providers are wholly devoted to treatment and are not doubling as the agents of law enforcement. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that the breaching of patient confidentiality and the threat of criminal prosecution serves as a real deterrent to pregnant women who suffer from chemical dependence from seeking and obtaining prenatal care.

Amicus Curiae Association of Reproductive Health Professionals ("ARHP") is a non-profit, interdisciplinary medical association for leaders in the field of reproductive health. Founded in 1963 and comprised of physicians, nurse practitioners, other clinicians, pharmacists, and researchers, ARHP serves as an important source of reproductive health education and information for health care professionals, patients, the media, legislators, and other professionals. ARHP is accredited by the Accreditation Council for Continuing Medical Education and for the past 35 years has sponsored clinical education for physicians on reproductive health issues. ARHP is deeply concerned that the decision threatens to undermine the quality of care provided by physicians, nurse practitioners, and other clinicians who treat pregnant and parenting women in South Carolina.

Amicus Curiae American Medical Women's Association ("AMWA") is a national, non-profit organization of over 10,000 women physicians and physicians-in-training representing every medical specialty. Founded in 1915, AMWA is dedicated to promoting women in medicine and advocating for improved women's health policy. AMWA strongly supports treatment and rehabilitation of women who use alcohol and drugs during pregnancy, and opposes the arrest, jailing and/or prosecution of

pregnant women as a method for preventing or punishing chemical dependency during pregnancy. AMWA encourages all pregnant women to seek prenatal care and believes that breaching the medical confidentiality of these women or otherwise hindering their ability to establish a relationship of trust with their treatment providers will deter women, especially those that may be at high risk for adverse pregnancy outcomes, from receiving prenatal care.

Amicus Curiae National Women's Health Network (the "Network") is a national advocacy group representing 500,000 women through its individual and organizational members. The Network's goals include ensuring that all women have access to appropriate prenatal, delivery and post-partum care. Toward these goals, the Network works to eliminate cultural, economic, educational and legal barriers to health care for women. The Network staunchly opposes the breaching of patient confidentiality of women by virtue of their status as pregnant substance abusers, as well as the arrest and criminal charging and prosecution of pregnant addicts – policies which threaten to create yet another barrier to health care that will endanger the health of women and their future children.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through utilization of social work knowledge and skills. The South Carolina chapter of NASW has over 1,260 members. NASW and its South Carolina chapter believe that the expansion of law enforcement into the treatment context and the blurring of lines between prenatal / obstetrical care providers and peace officers

is inimical to family stability and counter to the best interests of the child.

Amicus Curiae Association for Medical Education and Research in Substance Abuse ("AMERSA") is a national organization of three hundred health care and social services professionals. AMERSA is committed to educating physicians, nurses, social workers, and other health care and social services professionals on the recognition and treatment of alcohol and drug problems. Many of AMERSA's members are psychiatrists, nurses, and social workers who specialize in substance abuse treatment; others are internists, family physicians, pediatricians, nurses, and social workers who work in general health and social services settings identifying individuals with alcohol and drug problems, providing counseling, and referring them as necessary to treatment specialists; most members are professors at medical schools, nursing schools, or social work programs. To be effective, prenatal care and treatment for pregnant addicts must occur in the context of a confidential, respectful, and trusting relationship between professional and patient. AMERSA believes that when this relationship is jeopardized net harm to the health of mothers and children will likely occur because women will be deterred from obtaining prenatal care, addiction treatment, and counseling.

Amicus Curiae Society for Medical Anthropology ("SMA") is a private, voluntary, not-for-profit organization of anthropologists and other social scientists who specialize in the anthropological study of health and healing. Current membership exceeds 1,300 professionals who are employed in traditional academic settings of colleges and universities, schools of public health and medical schools, as well as in applied research and service settings. SMA supports its members in the goal of educating academic and lay audiences about the cultural dimensions of health and disease in order to improve the health

of all populations. SMA is concerned about any policy or practice – like the one at issue here – that may prevent individuals and groups from seeking medical care during pregnancy. Prenatal care – which includes open and trusting communication between women and their care givers – is vital to positive birth outcomes, especially for low-income women whose poverty increases the risk of adverse health consequences.

Amicus Curiae California Medical Association ("CMA") is the primary professional association for individuals licensed to practice medicine in California. CMA has over more than 30,000 members representing all medical specialties that provide medical services throughout the state. CMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in California. CMA thus stands opposed to laws and policies, like the policy being challenged here, that unnecessarily hinder the effective practice of medicine or that have the effect of depriving persons of needed medical care.

Amicus Curiae California Society of Addiction Medicine ("CSAM") is the California chapter of The American Society of Addiction. CSAM's mission is to increase access to and improve the quality of addiction treatment through education and research, and to reduce the stigma and prejudice commonly associated with addiction disorders. Accordingly, CSAM opposes the policy being challenged in this case as it has the effect of driving pregnant women away from seeking substance abuse treatment and further stigmatizing chemical dependence by entwining it with criminal justice ramifications.

Amicus Curiae Institute for Health and Recovery ("IHR"), formerly the Coalition on Addiction, Pregnancy and Parenting, is a non-profit organization committed to the development of a continuum of comprehensive services for alcohol- and drug-

dependent women and their families throughout Massachusetts. IHR is committed to establishing collaborative models of service delivery and fostering family-centered services. IHR firmly believes that addiction is an illness requiring treatment, not a condition warranting arrest and possible prosecution and punishment. IHR members know firsthand the fears that pregnant substance abusing women have regarding arrest and loss of child custody, causing them to be reluctant to seek prenatal care and substance abuse treatment. Accordingly, IHR opposes the policy enacted by MUSC and challenged here.

Amicus Curiae Consortium for Substance Abusing Women and their Children ("The Consortium") is comprised of more than 60 agencies in the state of Connecticut dedicated to improving the health of and services available to substance abusing and mentally ill women and their children. The Consortium serves as the principal resource in Connecticut for the development and implementation of policy, advocacy, and technical assistance to promote the behavioral health of women and their children, the integration and coordination of services for women and their children, and access to and retention in treatment. Established in 1990 in response to data showing that New Haven led the nation in infant mortality rates, The Consortium oversees the development of client-based models of care for addicted and mentally ill women and their children. The Consortium opposes MUSC's policy being challenged in this case as improper and counterproductive measures for promoting maternal and child health.

Amicus Curiae Robert G. Newman, M.D., is President and Chief Executive Officer of Continuum Health Partners, Inc., comprising four hospitals with a total of 3,100 beds, and with the largest chemical dependency treatment services of any health care system in the United States. He is Professor of Epidemiology and Social Medicine and Professor of Psychiatry

at the Albert Einstein College of Medicine, and a member of the Board of Commissioners of the Joint Commission of Accreditation of Health Care Organizations. Dr. Newman has played a major role in the development of addiction treatment in the U.S., Australia, Asia and Europe.